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No. 85-1193

In The

# Supreme Court of the United States

October Term, 1985

JOHN S. MAGEE, INDIVIDUALLY and T/A COLLEGIATE RESEARCH SYSTEMS,
Petitioner,

v.

HAROLD J. RUVOLDT, PROSECUTOR OF HUDSON COUNTY,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## COUNTERSTATEMENT OF THE CASE

The present petition for a writ of *certiorari* filed by John S. Magee and Collegiate Research Systems seeks review of an order of the New Jersey Supreme Court declining to review an appellate court decision upholding the constitutionality of *N.J.S.A.* 2A:170-77.16 and rejecting the claims of selective enforcement of the statute. In so doing, the appellate court upheld the trial court's rejection of Magee's constitutional claims. The facts leading to this petition may be briefly summarized.

Magee operates a business in Hoboken, New Jersey known as Collegiate Research Systems which prepares and

sells research papers on diverse academic subjects (Pa12).* Prior to this time, Magee had been operating Collegiate Research Systems in New York. *People v. Magee,* 423 *N.Y.S.*2d 417 (Supreme Court 1979). On March 24, 1983 Investigator Donald Wiggins of the Hudson County Prosecutor's Office visited Magee's business wearing a hidden recording device. Wiggins presented himself as a student and ordered a fifteen page paper on nuclear arms control. In response to Magee's questions, Wiggins stated that the paper was for an undergraduate political science course and was due at the end of the semester. Wiggins completed an order form which asked for the subject matter of the paper, the number of pages the paper was to be, whether the paper was to be at the undergraduate or graduate level and whether a bibliography and footnotes were required. Wiggins received a double spaced typed paper entitled "The Historic Background of the Arms Race," which contained footnotes and a bibliography. The cover page did not list an author's name or contain any other identifying information. Wiggins paid Magee $225 for the paper (Pa12 to Pa13).

On March 29, 1983 Investigator Anthony Scott of the Hudson County Prosecutor's Office visited Magee's business wearing a hidden recording mechanism. Scott purchased two papers on capital punishment. When Scott asked whether he could just hand the papers in without any problems, Magee replied "I don't care anything what you're going with it . . . I'm just selling them." Scott paid Magee $70 for the two papers (Pa13).

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* This notation refers to the appendix to the Petition for a Writ of Certiorari filed by Magee in this matter.

On April 13, 1983 the Hudson County Prosecutor filed a verified complaint charging Magee with continued violation of *N.J.S.A.* 2A:170-77.16 by preparing and selling term papers to students knowing, or under circumstances having reason to know, that the papers were to be submitted by high school or college students in fulfillment of their academic requirements. Following a hearing held on May 4, 1983, a preliminary injunction was issued restraining Magee from engaging in conduct prohibited by *N.J.S.A.* 2A:170-77.16 (Pa9 to Pa10).

On December 7, 1983, Investigator Terrence Hull of the Hudson County Prosecutor's Office visited Magee's business wearing a hidden recording device. Hull ordered a paper on Cocaine. He was assured by Magee that the paper was original and that if another student selected the same topic a different writer would be assigned. Hull paid Magee $105.00 for the paper (Pa15).

On January 9, 1984 an order to show cause why Magee should not be held in contempt was issued. Magee was found guilty of contempt, sentenced to five days in the county jail and fined $500.00 (Pa1 to Pa3).

After a nonjury trial on the underlying action, on February 23, 1984 Magee was found guilty of two violations of *N.J.S.A.* 2A:170-77.16, fined $1.000 for each violation and was permanently enjoined from future violations of the Act (Pa4 to Pa7).

Magee appealed both the contempt citation and the *N.J.S.A.* 2A:170-77.16 convictions. Because Magee challenged the constitutionality of a New Jersey statute, the Attorney General was contacted by the Clerk of the Ap-

pellate Division to ascertain whether the Attorney General would defend the validity of *N.J.S.A.* 2A:170-77.16 on appeal. Pursuant to *N.J. Court Rule* 2:5-h(1), the Attorney General filed a brief in support of the constitutionality of *N.J.S.A.* 2A:170-77.16.

In an opinion dated August 5, 1985, the Appellate Division rejected all of Magee's arguments including his claim that *N.J.S.A.* 2A:170-77.16 is unconstitutionally vague and overbroad (Pa8 to Pa26). The Appellate Division observed that *N.J.S.A.* 2A:170-77.16 regulates communicative conduct rather than pure speech and explained that a three-pronged test is to be applied to determine if such regulation is constitutionally permissible (Pa16 to Pa17).

> If the regulated communicative activity is constitutionally protected to some degree, the issue becomes whether the regulation is so overbroad in proscribing the constitutionally protected activity, that it reaches farther than is permitted or necessary to fulfill the State's interest. *See State v. Lee,* 96 *N.J.* 156, 165 (1984); *Town Tobacconist v. Kimmelman,* 94 *N.J.* 85, 125 n.21 (1983); *In re Hinds,* 90 *N.J.* 604, 617-618 (1982). A regulation which restricts time, place or manner of protected free speech will survive constitutional scrutiny only if it: (1) may be justified without reference to the content of the regulated speech; (2) it serves a significant governmental interest by the least restrictive possible means; and (3) it provides for an open ample alternative means for the communication of the information. *Erznoznik v. City of Jacksonville,* 422 *U.S.* 205, 95 *S.Ct.* 2268, 45 *L.Ed.*2d 125 (1975); *State v. Miller,* 83 *N.J.* 402, 412 (1980); *Capitol Movies, Inc. v. City of Passaic,* 194 *N.J. Super.* 298, 303 (App. Div. 1984).
>
> Applying that three-prong test here, we are persuaded that *N.J.S.A.* 2A:170-77.16 is not facially overbroad. The statute prohibits the sale or offer for sale

> of academic assignments, regardless of content or subject matter, only when the distributor knows or has reason to know that the assignment is intended for submission under the student's name for academic credit. Second, it clearly advances a compelling governmental interest: combatting blatant, commercialized assistance in cheating that subverts the integrity of the educational system. *See* Ambash, "Trapping Term Paper Cheaters by Statute", 59 *A.B.A.J.* 162, 165 (1973). Finally, *N.J.S.A.* 2A:170-77.17 provides an adequate means of disseminating research material or other academic information which is not intended for submission under the student's name to an educational institution. We therefore reject defendant's "overbroad" constitutional challenge. [Pa17 to Pa19].

The Appellate Division also rejected Magee's claim that the statutory language, "or under circumstances having reason to know," is vague because Magee was found to have actual knowledge beyond a reasonable doubt of the purchaser's intent to submit the term paper under their names to their educational institutions (Pa19 to Pa21). Finally, the Appellate Division rejected Magee's selective enforcement and entrapment claims, his challenge to the preliminary injunction, and his other arguments (Pa22 to Pa26).

On August 26, 1985, Magee filed a Notice of Petition for certification with the Supreme Court of New Jersey. By order dated October 15, 1985, the Supreme Court of New Jersey denied the Petition for Certification (Pa27 to Pa28).

On January 10, 1986, Magee filed the present petition for a writ of *certiorari* to the Supreme Court of New Jersey.

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## ARGUMENT

### CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A STATE COURT DECISION WHICH DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT AND WHERE THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

It is a fundamental concept that review by the United States Supreme Court on Writ of *Certiorari* "is not a matter of right, but of judicial discretion . . . ." *Supreme Court Rule* 17. Given such discretion, it has been the long-standing practice of the Supreme Court to grant the writ "only when there are special and important reasons therefor." *Ibid.* Further, the Court will generaly grant *certiorari* from a state court determination only where the state court has decided a federal question of first impression or in a way in conflict with applicable decisions of the Supreme Court or other courts. *Id., Rule* 17(1) (b and c). None of these reasons exist in the present case, and the petition should therefore be denied.

This case involves a challenge by Magee to the constiutionality of *N.J.S.A.* 2A:170-77.16 which attempts to eradicate commercialized cheating by prohibiting, *inter alia,* the sale and offer for sale of assignments which the seller knows or has reason to know will be submitted in whole or substantial part under a student's name in fulfillment of academic requirements. Magee also attacks the contempt proceeding and alleges improper prosecutorial conduct. The State is participating in this matter only to defend the constitutionality of *N.J.S.A.* 2A:170-77.16.

Magee argues that *N.J.S.A.* 2A:170-77.16 is overbroad and vague. The statute provides:

> No person shall, for any fee, or other remuneration, prepare, offer to prepare, cause to be prepared, sell or offer for sale any term paper, thesis, dissertation, essay, report or other written, recorded, pictorial, artistic or other assignment knowing, or under the circumstances having reason to know, that said assignment is intended for submission either in whole or substantial part under a student's name in fulfillment of the requirements for a degree, diploma, certificate, course or courses of study at any university, college, academy, school or other educational institution. [*N.J.S.A.* 2A:170-77.16]

The prohibitions of *N.J.S.A.* 2A:170-77.16 are limited by *N.J.S.A.* 2A:170-77.16 which reads:

> Nothing contained in this act shall prevent any person from providing tutorial assistance, research material, information or other assistance to persons enrolled in a university, college, academy, school or other educational institution, which is not intended for submission directly or in substantial part as an assignment under the student's name to such educational institution in fulfillment of the requirements for a degree, diploma, certificate of course of study. Nor shall any person be prevented by this act from rendering services for a fee which include the typing, research, assembling, transcription, reproduction or editing of a manuscript or other assignment which he has not prepared at the request of or on behalf of the purchaser. [*N.J.S.A.* 2A:170-77.17]

In a facial challenge alleging overbreadth, the first task is to determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statute does not so reach, the overbreadth claim must fail. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 *U.S.* 489, 494, 102 *S.Ct.* 1186, 1191, 71

*L.Ed.*2d 362, 369 (1982). Where the enactment does prohibit protected communicative conduct, as opposed to pure speech, a sufficiently important governmental interest in regulating the nonspeech element can justify the incidental limitations of the First Amendment freedoms. *United States v. O'Brien,* 391 *U.S.* 367, 376 88 *S.Ct.* 1673, 1678-1679, 20 *L.Ed.*2d 672, 679-680 (1968); *Cox v. Louisiana,* 379 *U.S.* 536, 555, 85 *S.Ct.* 453, 464, 13 *L.Ed.*2d 471, 484 (1965); *California v. LaRue,* 409 *U.S.* 109, 117, 93 *S.Ct.* 390, 396, 34 *L.Ed.*2d 342, 351 (1972). As explained in *Giboney v. Empire Storage & Ice Co.,* 336 *U.S.* 490, 502, 69 *S.Ct.* 684, 691, 93 *L.Ed.* 834, 843-844 (1949)

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society [citations omitted].

A governmental regulation of communicative conduct withstands constitutional scrutiny if it furthers an important or substantial governmental interest, if it can be justified without reference to the content of the regulated speech and if sufficient alternative channels remain for the communication of the information. *United States v. O'Brien, supra,* 391 *U.S.* at 377, 88 *S.Ct.* at 1679, 20 *L.Ed.* 2d at 680. In the instant case, it is clear that *N.J.S.A.* 2A:170-77.16 is not a direct infringement upon either noncommercial or commercial speech. The enactment does not limit the seller's right to engage in free speech, free

press or the dissemination of information. Rather the statute prohibits the sale and offer for sale of assignments the seller knows will be submitted in whole or in substantial part under a student's name in fulfillment of a requirement of an educational institution. It is commercialized cheating, the selling of materials known to be utilized to effect plagiarism, which is prohibited, not the writing or sale of research material. The act therefore does not restrict speech as such, but simply prohibits the knowing sale of assignments to be used for illicit cheating. The statute then does not embrace either noncommercial or commercial speech. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 455 *U.S.* at 496-497, 102 *S.Ct.* at 1192, 71 *L.Ed.*2d at 370-371.

Assuming that the statute is viewed as limiting commercial speech, it is well established that a government may regulate illicit activities such as plagiarism in the classroom. Because the act is aimed only at sales of assignments which are used as part of cheating schemes, the statute is valid. Moreover, the overbreadth doctrine does not apply to commercial speech and Magee's overbreadth claims are therefore insubstantial. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 455 *U.S.* at 496-497, 102 *S.Ct.* at 1192, 71 *L.Ed.*2d at 370; *Town Tobacconist v. Kimmelman,* 94 *N.J.* 85, 126 (1983).

Moreover, even if *N.J.S.A.* 2A:170-77.16 is considered as a restriction upon conduct which involves a significant communicative element, such as burning a draft card or marching in an anti-nuclear protest, it is clear that the act withstands the multi-pronged test enunciated in *O'Brien, supra.* As explained by the Appellate Division,

> The statute prohibits the sale or offer for sale of academic assignments, regardless of content or subject matter, only when the distributor knows or has reason to know that the assignment is intended for submission under the student's name for academic credit. Second, it clearly advances a compelling governmental interest. combatting blatant, commercialized assistance in cheating that subverts the integrity of the educational system. Finally, *N.J.S A.* 2A:170-77.17 provides an adequate means of disseminating research materials or other information which is not intended for submission under the student's name to an educational institution. [Pa19].

The statute furthers the important State interest in eliminating cheating in the academic setting and so insuring that students receive a thorough and quality education. *N.J.S.A.* 2A:170-77.16 accomplishes this goal without reference to the content of the purchased assignments and specifically provides in *N.J.S.A.* 2A:170-77.17 for the operation of research and tutorial enterprises which do not knowingly aid in cheating schemes. Because the statute withstands the strict scrutiny accorded regulations of communicative conduct, the Appellate Division properly rejected Magee's overbreadth argument.

Magee's vagueness challenge to the "or under the circumstances having reason to know" language of *N.J.S.A.* 2A:170-77.16 was properly dismissed by the State court because Magee was found to have actual knowledge that the papers purchased from him by the undercover officers were to be submitted under the purchasers' names and the "having reason to know" phrase of the statute was therefore not applied to him. It is well established that a person who engages in conduct which is clearly proscribed by an enactment cannot complain of the vague-

ness of the law as applied to others. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 455 *U.S.* at 495, 102 *S.Ct.* at 1191, 71 *L.Ed.*2d at 370; *Parker v. Levy,* 417 *U.S.* 733, 756, 94 *S.Ct.* 2547, 2562, 41 *L.Ed.*2d 439, 458 (1974). The State court's dismissal of Magee's vagueness argument was clearly proper because Magee's action, the sale of assignments the seller knows will be used in a cheating scheme, is clearly proscribed by the act.

In sum, the law at issue serves a valid purpose and addresses a serious problem affecting educational institutions. The New Jersey Legislature has chosen to address this problem by basing its enactment upon a Model Act. See Ambash, "Trapping Term Paper Cheaters by Statute," 59 *A.B.A.J.* 162, 165 (Feb. 1973). The law is narrowly drafted to avoid precisely the constitutional concerns raised by Magee and the State therefore submits that the constitutional challenge to *N.J.S.A.* 2A:170-77.16 is without merit and that the petition for a writ of *certiorari* should accordingly be denied.

———o———

## CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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DATED: February 11, 1986